EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

RECEIVED
JUN 25 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 86-6884

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ELBERT WELCH,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and MS. FRANCES MILLS, Chief of Mental Hygiene Department,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
Telephone (518) 474-7168

Dated: June 23, 1987

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

NANCY A. SPIEGEL
Assistant Attorney General

Of Counsel

Question Presented for Review

Whether a district court order denying appointment of counsel in an action under 42 USC § 1983 is appealable as a collateral order prior to entry of a final judgment.

TABLE OF CONTENTS

	Page
Question Presented for Review	i.
Citations to Decisions Below	1
Preliminary Statement	1
Statement of the Case	2
ARGUMENT	
Point I - This Court has recently denied certiorari in a case presenting the same issue as that presented here. There has been no change in circumstances such that a different result should obtain now	4
Point II - An order denying appointment of counsel in a civil rights action is not appealable until entry of a final judgment	7
Conclusion	12

TABLE OF AUTHORITIES

	Page
Cases	
Appleby v Meachum, 696 F2d 145 (1st Cir 1983).....	5fn, 11
Brooks v Central Bank of Birmingham, 717 F2d 1340 (11th Cir 1983).....	5fn
Catlin v United States, 324 US 229 (1945).....	7
Cohen v Beneficial Industrial Loan Corp., 337 US 541 (1949).....	8
Coopers and Lybrand v Livesay, 437 US 463 (1978).....	7
Cotner v Mason, 657 F2d 1390 (10th Cir 1981).....	5fn, 11
Firestone Tire and Rubber Co. v Risjord, 449 US 368 (1981).....	5, 6, 7, 9, 10, 11
Flanagan v United States, 465 US 259 (1984).....	5, 6, 7, 8, 11
Henry v City of Detroit Manpower Dept., 763 F2d 757 (6th Cir en banc), cert denied, ___ US ___, 106 S Ct 604 (1985).....	4, 5fn, 6fn, 9
Hodge v Police Officers, 802 F2d 58 (2d Cir 1986)....	10fn
Jones v WFYR Radio/RKO General, 626 F2d 576 (7th Cir 1980).....	5fn
Kuster v Block, 773 F2d 1048 (9th Cir 1985).....	5fn
Maclin v Freake, 650 F2d 885 (7th Cir 1981).....	9
Miller v Pleasure, 425 F2d 1205 (2d Cir), cert denied, 400 US 880 (1970).....	10
Miller v Simmons, 814 F2d 962 (4th Cir 1987).....	5fn, 9
Randle v Victor Welding Supply Co., 664 F2d 1064 (7th Cir 1981).....	5fn, 11
Ray v Robinson, 640 F2d 474 (3d Cir 1981).....	5fn
Richardson-Merrell, Inc. v Koller, 472 US 424 (1985).	6, 7, 8, 11
Robbins v Maggio, 750 F2d 405 (5th Cir 1985).....	5fn, 6fn
Slaughter v City of Maplewood, 731 F2d 587 (8th Cir 1984).....	5fn
Smith-Bey v Petsock, 741 F2d 22 (3d Cir 1984).....	5fn, 11
United States v MacDonald, 435 US 850 (1978).....	10
United States v Ryan, 402 US 530 (1971).....	10

TABLE OF AUTHORITIES (cont'd)

	Page
Federal Statutes	
28 USC § 636(b)(1)(A).....	2
28 USC § 1291.....	7, 8
28 USC § 1915(d).....	2, 9
42 USC § 1983.....	1, 9fn
Federal Regulations	
Federal Rules of Civil Procedure 72(a).....	3
Miscellaneous	
15 Wright, Miller and Cooper, Federal Practice and Procedure, § 3907, p 433 (1976).....	8

No. 86-6884

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ELBERT WELCH,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent, Attica Correctional Facility, and MS. FRANCES MILLS, Chief of Mental Hygiene Department,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Citations to Decisions Below

The opinion of the United States Court of Appeals for the Second Circuit sought to be reviewed is reported at 810 F2d 40 (2d Cir 1987). The memorandum and order of the District Court for the Western District of New York is unreported. It is included as Appendix K to the petition for certiorari.[1]

Preliminary Statement

In this proceeding pursuant to 42 USC § 1983, petitioner, an inmate appearing pro se, seeks this Court's review of the Court of Appeals' dismissal of his appeal to that court. The Court of Appeals held that the interlocutory district court

1 The appendices to the petition will hereafter be cited as "(App ___)".

order at issue, which had denied petitioner's request for appointment of counsel under 28 USC § 1915(d), could not be challenged separately by direct appeal but could only be reviewed after a final judgment (App A).

Statement of the Case

Petitioner, an inmate at the Attica Correctional Facility, commenced this civil rights action on or about April 10, 1979. In his complaint, petitioner challenged the conditions of his confinement and alleged that he had been denied access to certain legal papers. He subsequently has become preoccupied with a "secret order" supposedly made by the Appellate Division, Fourth Department, of the New York Supreme Court reversing his underlying criminal conviction (Pet, pp 6-9).

In June, 1984, petitioner moved pursuant to 28 USC § 1915(d) for the appointment of counsel to represent him in this matter. Respondents took no position with respect to the requested relief. Pursuant to 28 USC § 636(b)(1)(A), the motion was referred to a magistrate for determination. The magistrate denied the motion without prejudice to renewal (App E), finding that petitioner had not justified the appointment of counsel at that time (id., p 5). The magistrate further noted that petitioner was an articulate inmate who appeared capable of adequately presenting his own claim (id., p 4).

Petitioner did not request reconsideration of the magistrate's order by the district court as authorized by 28 USC § 636(b)(1)(A). Instead, he sought to appeal the order directly to the Court of Appeals. Pursuant to respondents' motion, the Court of Appeals dismissed the appeal on October 24, 1984 "* * * without prejudice to renewal of the appeal upon entry of a final judgment" (App F).

On or about November 17, 1984, petitioner moved before the magistrate to renew his request for appointment of counsel. In a decision and order filed on January 14, 1985 (App G), the magistrate did reconsider the matter on the merits and determined to adhere to his earlier decision.

On or about January 30, 1985, petitioner sought review by the district court of the magistrate's second order. By order filed February 8, 1985, the court denied petitioner's appeal for lack of timeliness, citing petitioner's failure to file his objections within the 10-day period specified in FRCP 72(a) (App H). Petitioner thereafter took a second appeal to the Court of Appeals.

Subsequently, on March 29, 1985, the district court took the unusual step of filing a memorandum in which the court discussed petitioner's explanation for the delay in seeking reconsideration of the magistrate's order. Petitioner had apparently alleged in a letter to the court that although the magistrate's order was filed on January 14, 1985, he did not receive it until January 30, 1985. He also claimed that the envelope in which the order arrived was postmarked January 29, 1985. The district court, after noting that it was without jurisdiction in the matter because a notice of appeal had been filed, stated that petitioner's contentions would have been considered had the court been aware of them prior to issuing its February 8, 1985 order (App I).

In light of this memorandum, the Court of Appeals on September 16, 1985 dismissed petitioner's appeal without prejudice and remanded the matter to the district court for reconsideration of petitioner's request for review of the magistrate's decision (App J).

In accordance with the Court of Appeals' instructions, the district court reviewed and accepted petitioner's excuse for his

lack of timeliness and proceeded to consider the merits of petitioner's appeal (App K). The district court found that the magistrate's refusal to appoint counsel for petitioner was reasonable, and not clearly erroneous, and therefore denied the relief sought (id.). Petitioner then took his third appeal to the Court of Appeals. On January 27, 1986, that court dismissed the appeal, holding on the basis of stare decisis that orders denying appointment of counsel are not directly appealable in the Second Circuit (App A).

ARGUMENT

POINT I

THIS COURT HAS RECENTLY DENIED CERTIORARI IN A CASE PRESENTING THE SAME ISSUE AS THAT PRESENTED HERE. THERE HAS BEEN NO CHANGE IN CIRCUMSTANCES SUCH THAT A DIFFERENT RESULT SHOULD OBTAIN NOW.

In Henry v City of Detroit Manpower Dept., 763 F2d 757 (6th Cir en banc), cert denied, ___ US ___, 106 S Ct 604 (1985), this Court declined, over dissents from Justices White and Blackmun, to review the identical question presented by the case at bar, i.e., whether denial of appointment of counsel in a civil rights action is immediately appealable.[2] We submit that the question is no more worthy of this Court's review today than it was less than two years ago.

---

2 The Henry case also presented the issue of the appealability of orders denying counsel in Title VII actions. This Court similarly chose not to consider that question.

While it is concededly true, as petitioner states, that there is a conflict among the circuits on this matter,[3] this in and of itself does not warrant the granting of certiorari. First, the conflict petitioner cites was just as evident in 1985 when certiorari was denied in Henry. Second, the difference of opinion among the circuits has in fact been diminishing in recent years. For the most part, although not unanimously, as the Courts of Appeals have reconsidered the question presented in light of this Court's decisions on related issues in cases such as Flanagan v United States, 465 US 259 (1984), and Firestone Tire and Rubber Co. v Risjord, 449 US 368 (1981), the courts have concluded that the denial of counsel in civil rights actions are not appealable. See Smith-Bey v Petsock, 741 F2d 22 (3d Cir 1984), overruling Ray v Robinson, 640 F2d 474 (3d Cir 1981), and Randle v Victor Welding Supply Co., 664 F2d 1064 (7th Cir 1981), overruling Jones v WFYR Radio/RKO General, 626 F2d 576 (7th Cir 1980). In addition, after the Henry case, the one circuit to address the instant issue for the first time has weighed in with the majority. See Miller v Simmons, 814 F2d 962 (4th Cir 1987).

---

3 As of this writing, a total of eight circuits, seven in addition to the Second Circuit, hold that orders denying appointment of counsel in section 1983 actions are not appealable. Miller v Simmons, 814 F2d 962 (4th Cir 1987); Henry v City of Detroit Manpower Dept., supra; Kuster v Block, 773 F2d 1048 (9th Cir 1985); Smith-Bey v Petsock, 741 F2d 22 (3d Cir 1984); Appleby v Meachum, 696 F2d 145 (1st Cir 1983); Randle v Victor Welding Supply Co., 664 F2d 1064 (7th Cir 1981); Cotner v Mason, 657 F2d 1390 (10th Cir 1981). Two, perhaps three, circuits hold that such orders are appealable. Robbins v Maggio, 750 F2d 405 (5th Cir 1985) (but see dissenting opn of Garwood, J., 750 F2d at 414 et seq.); Slaughter v City of Maplewood, 731 F2d 587 (8th Cir 1984). See also, Brooks v Central Bank of Birmingham, 717 F2d 1340 (11th Cir 1983), incorporating the holdings of the Fifth Circuit.

Third, neither the Fifth nor the Eighth Circuits (which deem these orders appealable) have examined the issue in light of this Court's most recent discussion of a related matter in Richardson-Merrell, Inc. v Koller, 472 US 424 (1985).[4] In Richardson-Merrell, this Court reviewed its prior decisions and held that "orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases [see Flanagan v United States, supra] and orders denying a motion to disqualify in civil cases [see Firestone Tire and Rubber Co. v Risjord, supra], are not collateral orders subject to appeal as 'final judgments' within the meaning of 28 U.S.C. § 1291". 472 US at 440. In light of this Court's strong expression of concern with the avoidance of piecemeal litigation so evident in Richardson-Merrell, we submit that the few dissenting circuits would be hard-pressed to adhere to their views were the question to be presented to them anew.

Finally, it is important to note that what is involved here is purely a rule of procedure, not a question of substantive federal law. The rule of nonappealability adopted by the majority of the circuits does not preclude appellate review, it merely requires litigants to await the final outcome of their lawsuits. The issue here is basically a judicial "housekeeping" matter as to which national uniformity is not necessarily of inherent value or importance.

For all of these reasons, certiorari should be denied.

---

4 Robbins v Maggio, 750 F2d 405 (5th Cir 1985), was decided on January 14, 1985, while the Richardson-Merrell opinion was not issued until June 17, 1985. We also note that certiorari was denied in Henry v City of Detroit Manpower Dept. on December 16, 1985, after Richardson-Merrell.

POINT II

AN ORDER DENYING APPOINTMENT OF COUNSEL IN A CIVIL RIGHTS ACTION IS NOT APPEALABLE UNTIL ENTRY OF A FINAL JUDGMENT.

It is a given that under 28 USC § 1291, the Courts of Appeals have jurisdiction only to review final decisions of the district courts. The conclusion of eight of the Courts of Appeals that orders denying appointment of counsel are nonfinal and therefore nonappealable is, we submit, clearly correct. Indeed, that conclusion is virtually compelled by the three recent decisions of this Court discussed earlier which have strongly underscored the importance of section 1291's finality requirement and the avoidance of piecemeal litigation.

In Richardson-Merrell, Inc. v Koller, 472 US 424 (1985), Flanagan v United States, 465 US 259 (1984), and Firestone Tire and Rubber Co. v Risjord, 449 US 368 (1981), this Court held that neither the denial nor the granting of a motion for disqualification of counsel was a final, appealable order.[5] In so doing, the Court reiterated that section 1291 generally prohibits an appeal until a district court renders a decision "that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment'". Firestone Tire and Rubber Co., 449 US at 373, quoting Coopers and Lybrand v Livesay, 437 US 463, 467 (1978), and Catlin v United States, 324 US 229, 233 (1945). The Court observed that this finality requirement serves three salutary purposes. It minimizes appellate interference with a trial court's many pre-trial decisions, avoids harassment of opponents by successive

---

5 In Flanagan, the Court expressly likened a disqualification order to an order denying appointment of counsel in a criminal case. See p 11, post.

interlocutory appeals and promotes efficient judicial administration. Flanagan v United States, 465 US at 263-264. As the Court discussed in Richardson-Merrell, allowing immediate review of nonfinal orders would cause unreasonable disruption, delay[6] and expense. 472 US at 430. Such detriments are particularly unjustifiable in light of the fact that "[m]ost pretrial orders of district judges are ultimately affirmed by appellate courts". Richardson-Merrell, 472 US at 434, citing 15 Wright, Miller and Cooper, Federal Practice and Procedure, § 3907, p 433 (1976).

Section 1291's final judgment rule is subject to the very narrow "collateral order" exception, which applies to a small class of orders which are considered final although they do not end the litigation. See Cohen v Beneficial Industrial Loan Corp., 337 US 541 (1949). To fall within this exception,

> "* * * an order must at a minimum satisfy three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.' Coopers and Lybrand v. Livesay, 437 U.S. 463, 468 (1978)." Richardson-Merrell, 472 US at 431.

The district court order and the underlying orders of the magistrate here meet none of the requirements for appealability under the final collateral order exception.

First, the magistrate's original order plainly did not foreclose a renewal of petitioner's request for appointed counsel at a subsequent stage of the litigation. The order

---

6 The instant case is a perfect example. Petitioner's motion for appointment of counsel was denied by the magistrate on July 18, 1984. There has now been a delay of nearly three years occasioned by petitioner's attempts to obtain interlocutory appellate review.

states, "In the present case, appointment of counsel at this stage is unwarranted" (App E, p 3; emphasis added). Clearly, the magistrate has left open the possibility of appointing counsel for petitioner at a later time if, as the case progresses, such action becomes advisable. Thus, the orders involved here do not "conclusively determine the disputed question". See Firestone Tire and Rubber Co., 449 US at 380 (Rehnquist, J., concurring); Miller v Simmons, 814 F2d at 965, 966; Henry v City of Detroit Manpower Dept., 763 F2d at 761-762.

Second, the orders do not resolve an "issue completely separate from the merits of the action". Pursuant to 28 USC § 1915(d), appointment of counsel for an indigent litigant in a civil case is not a matter of right; it lies within the court's discretion. Maclin v Freake, 650 F2d 885 (7th Cir 1981). In exercising that discretion, a district court must consider, inter alia, whether the plaintiff's claim appears on its face to be not only nonfrivolous, but of sufficient merit to warrant representation by counsel. 650 F2d at 887. Indeed, the magistrate's denial of petitioner's motion here was based in part upon this consideration.[7] It is clear, therefore, that in determining a litigant's entitlement to counsel, a district court must necessarily consider issues enmeshed in the merits of

7 The magistrate noted that while petitioner's original complaint was not frivolous, his later preoccupation with a "secret" state court order supposedly reversing his conviction is frivolous in the context of this section 1983 action (App E, pp 3-4). Since petitioner's rationale for seeking appointed counsel concerns his need for assistance in pursuing discovery on this matter, the magistrate's evaluation of its facial merits was clearly necessary in order to rule on the motion.

his underlying cause of action.[8] See Miller v Pleasure, 425 F2d 1205 (2d Cir), cert denied, 400 US 880 (1970).

The third and perhaps most clearly dispositive reason for not permitting appellate review at this time is that the denial of counsel is not "effectively unreviewable on appeal from a final judgment". This Court has held that this condition is met only "'where denial of immediate review would render impossible any review whatsoever'" because the order "'involved an asserted right the legal and practical value of which could be destroyed if it were not vindicated before trial'". Firestone Tire and Rubber Co. v Risjord, 449 US at 376, 377, quoting United States v Ryan, 402 US 530, 533 (1971), and United States v MacDonald, 435 US 850, 860 (1978), respectively.

Because an erroneous denial of counsel can be fully remedied by a post-judgment appeal, reversal and a new trial,[9] such a determination does not fall within the narrow category of

8 Petitioner claims that the orders at issue in Flanagan and Firestone require a showing of prejudice after trial on appellate review, whereas review of orders denying appointment of counsel are based on the court's knowledge at the time. He then argues that while review of the former involve the underlying merits, review of the latter do not. Petition, pp 19-20, 21. This Court has said, however, that it "has never held that prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases". Richardson-Merrell, 472 US at 438. In any event, it does not follow that review of orders denying counsel do not involve the merits -- they simply involve an assessment of the merits at a different point in time.

9 The Second Circuit has held that the remedy for an erroneous denial of counsel actually involves two steps. First, counsel must be appointed and the matter remanded to the district court. Second, the plaintiff and his new counsel must demonstrate that the plaintiff was in fact prejudiced at his trial. Hodge v Police Officers, 802 F2d 58, 62 (2d Cir 1986). Thus, only if the plaintiff demonstrates actual prejudice resulting from the failure to appoint counsel will a new trial be ordered.

appealable collateral orders. Smith-Bey v Petsock, 741 F2d 22 (3d Cir 1984); Appleby v Meachum, 696 F2d 145 (1st Cir 1983); Randle v Victor Welding Supply Co., 664 F2d 1064 (7th Cir 1981); Cotner v Mason, 657 F2d 1390 (10th Cir 1981). As the Court stated in Firestone Tire and Rubber v Risjord, 449 US at 378, "interlocutory orders are not appealable 'on the mere ground that they may be erroneous'". When an appeals court vacates a judgment based upon an erroneous denial of counsel and the district court subsequently grants a new trial, the only harm suffered by the plaintiff is the delay caused by the need to retry the case. Although this may be a substantial inconvenience, it is no more than that experienced by litigants whenever a trial judge has committed an error necessitating a retrial.

The conclusion that reversal of the final judgment followed by a new trial provides complete redress for an erroneous and prejudicial denial of counsel follows ineluctably from the decisions in Richardson-Merrell, Firestone and Flanagan. As the Third Circuit pointed out in Smith-Bey v Petsock, the denial of appointed counsel is indistinguishable for appealability purposes from the disqualification of a party's choice of counsel, since the final outcome could be affected in the same manner in both cases. 741 F2d at 25-26. Indeed, this Court in Flanagan expressly compared these two kinds of orders with respect to the effectiveness of a post-judgment appeal:

> "Similarly, post-conviction review is concededly effective to the extent that petitioners' asserted right is like the Sixth Amendment rights violated when a trial court denies appointment of counsel altogether * * *." 465 US at 268.

In sum, the court below correctly dismissed petitioner's appeal for lack of jurisdiction.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

Dated: Albany, New York
June 23, 1987

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents

O. PETER SHERWOOD
Solicitor General

PETER H. SCHIFF
Deputy Solicitor General

NANCY A. SPIEGEL
Assistant Attorney General

Of Counsel